

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

KELLY KUSAK, an individual, )  
on behalf of LEONARD )  
SPINGOLA, deceased, )  
Plaintiff, ) No. CV-09-6369-HU  
v. )  
COMMISSIONER OF SOCIAL ) OPINION AND ORDER  
SECURITY ADMINISTRATION, )  
Defendant. )

---

Kathryn Tassinari  
Robert Baron  
HARDER, WELLS, BARON, & MANNING, PC  
474 Willamette St., Suite 200  
Eugene, OR 97401  
Attorneys for Plaintiff

Adrian Brown  
U.S. ATTORNEY'S OFFICE  
District of Oregon  
1000 S.W. Third Avenue, Suite 600  
Portland, OR 97204

William Le  
SOCIAL SECURITY ADMINISTRATION  
Office of the General Counsel  
701 Fifth Avenue, Suite 2900, M/S 221A  
Seattle, WA 98104  
Attorneys for Defendants

1 HUBEL, Magistrate Judge:

2 Plaintiff Kelley Kusak brings this action on behalf of her  
3 deceased father, Leonard Spingola, pursuant to section 405(g) of  
4 the Social Security Act (the "Act") to obtain judicial review of  
5 a final decision of the Commissioner denying his application for  
6 disability insurance benefits ("DIB"). I affirm the decision of  
7 the Commissioner.

8 **DISABILITY ANALYSIS**

9 The Social Security Act (the "Act") provides for payment of  
10 disability insurance benefits to people who have contributed to  
11 the Social Security program and who suffer from a physical or  
12 mental disability. 42 U.S.C. § 423(a)(1). In addition, under the  
13 Act, supplemental security income benefits may be available to  
14 individuals who are age 65 or over, blind, or disabled, but who do  
15 not have insured status under the Act. 42 U.S.C. § 1382(a).

16 The claimant must demonstrate an inability to engage in any  
17 substantial gainful activity by reason of any medically  
18 determinable physical or mental impairment which can be expected to  
19 cause death or to last for a continuous period of at least twelve  
20 months. 42 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A). An  
21 individual will be determined to be disabled only if his physical  
22 or mental impairments are of such severity that he is not only  
23 unable to do his previous work, but cannot, considering his age,  
24 education, and work experience, engage in any other kind of  
25 substantial gainful work which exists in the national economy. 42  
26 U.S.C. §§ 423(d)(2)(A) and 1382c(a)(3)(B).

27 The Commissioner has established a five-step sequential  
28 evaluation process for determining if a person is eligible for

1 either DIB or SSI due to disability. The claimant has the burden  
2 of proof on the first four steps. *Parra v. Astrue*, 481 F.3d 742,  
3 746 (9th Cir. 2007), cert. denied, 128 S. Ct. 1068 (2008);  
4 20 C.F.R. §§ 404.1520 and 416.920. First, the Commissioner  
5 determines whether the claimant is engaged in "substantial gainful  
6 activity." If the claimant is engaged in such activity, disability  
7 benefits are denied. Otherwise, the Commissioner proceeds to step  
8 two and determines whether the claimant has a medically severe  
9 impairment or combination of impairments. A severe impairment is  
10 one "which significantly limits [the claimant's] physical or mental  
11 ability to do basic work activities." 20 C.F.R. §§ 404.1520(c) and  
12 416.920(c). If the claimant does not have a severe impairment or  
13 combination of impairments, disability benefits are denied.

14 If the impairment is severe, the Commissioner proceeds to the  
15 third step to determine whether the impairment is equivalent to one  
16 of a number of listed impairments that the Commissioner  
17 acknowledges are so severe as to preclude substantial gainful  
18 activity. 20 C.F.R. §§ 404.1520(d) and 416.920(d). If the  
19 impairment meets or equals one of the listed impairments, the  
20 claimant is conclusively presumed to be disabled. If the  
21 impairment is not one that is presumed to be disabling, the  
22 Commissioner proceeds to the fourth step to determine whether the  
23 impairment prevents the claimant from performing work which the  
24 claimant performed in the past. If the claimant is able to perform  
25 work which he or she performed in the past, a finding of "not  
26 disabled" is made and disability benefits are denied. 20 C.F.R.  
27 §§ 404.1520(e) and 416.920(e).

28 If the claimant is unable to perform work performed in the

1 past, the Commissioner proceeds to the fifth and final step to  
2 determine if the claimant can perform other work in the national  
3 economy in light of his or her age, education, and work experience.  
4 The burden shifts to the Commissioner to show what gainful work  
5 activities are within the claimant's capabilities. *Parra*, 481 F.3d  
6 at 746. The claimant is entitled to disability benefits only if he  
7 or she is not able to perform other work. 20 C.F.R. §§ 404.1520(f)  
8 and 416.920(f).

#### 9 STANDARD OF REVIEW

10 The court must affirm a denial of benefits if the denial is  
11 supported by substantial evidence and is based on correct legal  
12 standards. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir.  
13 2005). Substantial evidence is more than a "mere scintilla" of the  
14 evidence but less than a preponderance. *Id.* "[T]he commissioner's  
15 findings are upheld if supported by inferences reasonably drawn  
16 from the record, and if evidence exists to support more than one  
17 rational interpretation, we must defer to the Commissioner's  
18 decision." *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2003)  
19 (internal citations omitted). Thus, the question before the court  
20 is not whether the Commissioner reasonably could have reached a  
21 different outcome, but whether the Commissioner's final decision is  
22 supported by substantial evidence. *See Magallanes v. Bowen*, 881  
23 F.2d 747, 750 (9th Cir. 1989).

#### 24 THE ALJ'S DECISION

25 The Administrative Law Judge ("ALJ") found that Spingola  
26 suffered from the severe impairments of alcoholism and lumbar  
27 degenerative disc disease. Further, the ALJ found that Spingola  
28 had mild restrictions in activities of daily living and moderate

1 difficulties in maintaining concentration. Spingola had the  
2 residual functional capacity to perform light duty work, except  
3 that during an eight hour day, he could stand or walk no more than  
4 four hours. He should not have had exposure to hazards or have  
5 climbed ladders, ropes, or scaffolds due to his alcohol  
6 consumption. He was restricted to occasional stooping, bending, or  
7 crouching. He was able to frequently crawl. He was limited to one  
8 to three step tasks. Based on the above limitations, the ALJ  
9 concluded that Spignola could have performed work as an assembler  
10 of small products, a cashier II, or an electronics assembler.

#### 11 **FACTS**

12 Spignola was deceased at the time of the ALJ's opinion. He  
13 died at the age of 54 on April 12, 2008, of cirrhosis and  
14 alcoholism. Tr. 174. During his life, Spignola had been employed  
15 as auto mechanic and an automobile repair service estimator. Tr.  
16 112. He was a high school graduate. Tr. 174, 291. At one point  
17 he claimed he had been disabled since April 2, 1999, and later he  
18 claimed disability since February 1, 2004, but after his death and  
19 the substitution of his daughter Ms. Kusak as the claimant in this  
20 case, she amended the alleged onset date to May 18, 2006. Tr. 11,  
21 163, 183. Spingola's last date insured was June 30, 2007. Tr. 12.  
22 On March 26, 2007, Spignola alleged he was disabled due to "acute  
23 cronic [sic] back pain with acute and cronic [sic] shoulder  
24 [pain]." Tr. 183, 191.

25 Prior to his death, Spingola typically woke up between 6:30  
26 and 7:00 a.m., showered, and made himself breakfast. Tr. 300. He  
27 would then watch TV until roughly 1 pm and then take a nap. Tr.  
28 209. He made his own dinner, watched more television, and then

1 went to bed between 10 p.m. and midnight. Tr. 209, 300. He did  
2 laundry weekly, wiped down surfaces in his house, and did other  
3 basic cleaning. Tr. 203, 211. He went outside daily, and was able  
4 to do so alone. Tr. 204. Spingola could drive and was able to do  
5 light shopping for groceries. Tr. 204. He smoked one pack of  
6 cigarettes per day for 18 years prior to his death, Tr. 291, 300,  
7 and typically ate just one meal per day. Tr. 253.

8 Spignola alleged he had "a history of chronic back pain,"  
9 although he could not trace it to any particular accident or event.  
10 Tr. 299. He had back surgery at some point in the 1980s, and again  
11 in the 1990s, to address issues with the L5-S1 and L4-L5 vertebrae.  
12 Id. Despite the surgeries, Spingola continued to report that he  
13 has "chronic back pain all day" that "is localized to his lumbar  
14 back." Id. In Spingola's view, "his only current work related  
15 problem [was] back pain." Tr. 291.

16 In June 2007, Spingola related to examining psychologist Dr.  
17 McConochie that because of his pain, "he can be on his feet and  
18 busy for about 15-30 minutes if there is no heavy lifting. He  
19 often needs a five-minute rest to do continuous activities." Tr.  
20 293. During the same interview, Spingola said, "Standing and  
21 walking for more than five minutes is sometimes very tough." Tr.  
22 291. The same month Spingola told an examining internist, Dr.  
23 Komanapalli that "[h]e spends a quarter of his day on his feet."  
24 Tr. 300.

25 Dr. Komanapalli assessed that "the number of hours the  
26 claimant could be expected to stand and walk in an eight-hour work  
27 day is between two and four hours." Tr. 303. A non-examining  
28 physician, Dr. Neal Berner, opined, based on his review of the

1 medical records, that Spingola could stand or walk "about 6 hours  
2 in an 8-hour workday." Tr. 307. He explained that he disagreed  
3 with Dr. Komanapalli's assessment because a "2-4 hour stand walk is  
4 excessive restriction [*sic*] based on [claimant's] own report of  
5 being on feet 1/4 of each day." Tr. 312. In spite of his  
6 complaints, Spingola did not take any prescription medications for  
7 his pain. Tr. 291. Instead of taking medication or seeking other  
8 medical treatment, Spingola preferred to treat his pain by drinking  
9 alcohol. Tr. 345.

10 On January 7, 2007, Spignola was hospitalized due to an  
11 alcohol withdrawal seizure. Tr. 252. Kusak had found her father  
12 with his eyes rolled back in his head, his teeth clenched,  
13 unresponsive to stimuli, and his upper extremities displaying  
14 chaotic activities. Id. During admission to the hospital, Kusak  
15 told doctors at Sacred Heart that Spingola had been drinking 10-12  
16 glasses of rum per day for the previous 8 years. Tr. 252. During  
17 that period there "ha[d] not been any attempts at cessation of his  
18 alcohol consumption." Id. On June 7, 2007, Spingola "admit[ted]  
19 to having an average of one alcoholic drink per day, but denie[d]  
20 that he ha[d] abused alcohol in the past." Tr. 291. On June 14,  
21 2007, Spingola contradicted his June 7, 2007 statement when he told  
22 Dr. Komanapalli that "he still drinks 3-4 days a week and up to  
23 three beers at a time." Tr. 299. Continuing his inconsistent  
24 reports, on December 17, 2007, Spingola said he "drinks anywhere  
25 between 4-8 drinks a day, beer, hard liquor," in order to treat his  
26 back pain. Tr. 345.

27 According to the emergency room's Dr. Geoffrey Gordon,  
28 Spignola related, "He does get quite shaky if he does not drink,

1 but he rarely goes a day without drinking." Tr. 255. On June 7,  
2 2007, the day of his neuropsychological exam, he did not drink and  
3 the psychologist, Dr. McConochie, observed that Spingola "does have  
4 a bilateral hand tremor, suggestive of neurological problems." Tr.  
5 291. Spingola's hand tremors, however, were not noted by Dr.  
6 Komanapalli during a full physical examination on June 14, 2007.  
7 Dr. Komanapalli commented extensively on Spingola's ability to use  
8 his hands:

9 Claimant is able to grip and hold objects securely to the  
10 palm by the last three digits. Claimant is also able to  
11 grasp and manipulate both large and small objects with  
12 the first three digits. Claimant's thumb functions with  
13 normal opposition. There is no evidence of myotonia or  
14 grip release. There is no evidence of localized  
15 tenderness, erythema, or effusion. There is no evidence  
16 of diminution of function with repetition. There is no  
17 evidence of spasticity or ataxia. Sensation to touch and  
18 pin in all five fingers is normal. Joint position,  
19 vibration sense, graphesthesia and stereognosis are  
20 normal. Subjective and objective findings are consistent.  
21 Functional limitations are based on both subjective and  
22 objective findings. Hand and finger anatomy is normal;  
23 there are no effusions, deformities, areas of erythema,  
24 swelling, or gouty tophi.

25 Tr. 302-03. Dr. Komanapalli concluded, "There are no manipulative  
26 limitations." A non-examining consulting physician, Dr. Neal  
27 Berner, noted the discrepancy in shorthand, "Clmt has bilat hand  
28 tremor during neuro psych but not during physical CE, OV's or hspt  
reports." Tr. 311.

Disability Determination Services referred Spingola to  
psychologist William McConochie, Ph.D. for a neuropsychological  
exam which took place on June 7, 2007. Tr. 290. The appointment  
was to be cancelled if Spingola arrived inebriated, but the  
examiner opined that was Spingola was sober on arrival. Tr. 290.  
During the interview, Spingola said "his only current work related



1 problem is back pain, which bothers him especially if he is  
2 physically active." Tr. 291. McConochie opined that Spingola's  
3 "thought content was logical," Tr. 291, and that during the  
4 interview and testing process Spingola "had good attention and  
5 concentration." Tr. 292. Dr. McConochie indicated that Spingola  
6 had no impairment in the areas of sustained concentration and  
7 attention, persistence, or in his ability to engage in appropriate  
8 social interaction. Tr. 295. Dr. McConochie opined that Spingola  
9 had a mild to moderate impairment in his ability to understand and  
10 remember instructions. Tr. 295. Nevertheless, Dr. McConochie  
11 diagnosed Spingola with "Dementia due to chronic alcohol abuse, by  
12 medical record." Tr. 295. He concluded that Spingola's "primary  
13 psychological limitation to work activity is borderline level  
14 intellectual functioning as an aspect of apparent dementia.  
15 Prognosis for improvement in this condition is poor, he does not  
16 acknowledge alcohol abuse, which appears to be the underlying  
17 origin of this deficiency . . . He is still drinking." Tr. 295-96.

#### 18 **DISCUSSION**

19 Kusak argues that the ALJ erred by (1) failing to include  
20 dementia and bilateral hand tremors as "severe" impairments at step  
21 two; (2) failing to give full credit to the opinion of Dr.  
22 McConochie, the examining psychologist; (3) failing to give full  
23 credit to Dr. Komanapalli, the examining physician; (4) failing to  
24 find disability by application of the Medical-Vocational rules (5)  
25 failing to credit Kusak's lay testimony about her father; and (6)  
26 failing to meet her burden of proving that Spingola retained the  
27 ability to perform other work in the national economy.

28 I address each assignment of error in turn.

1 I. Severe Impairments

2 An impairment is severe "when alone or in combination with  
3 another medically determinable physical or mental impairment(s), it  
4 significantly limits an individual's physical or mental ability to  
5 do basic work activities." SSR 02-01p. "[A]n ALJ may find that a  
6 claimant lacks a medically severe impairment or combination of  
7 impairments only when his conclusion is clearly established by  
8 medical evidence." Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir.  
9 2005) (quotations omitted). "An impairment can be considered as  
10 not severe [at step two] only if it is a slight abnormality which  
11 has such a minimal effect on the individual that it would not be  
12 expected to interfere with the individual's ability to work,  
13 irrespective of age, education, or work experience." SSR 85-28;  
14 Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988).

15 Kusak argues that the ALJ erred by failing to find that  
16 dementia and hand tremors were severe impairments. For the reasons  
17 set forth below, I disagree.

18 A. Hand Tremors

19 "The ALJ is responsible for determining credibility, resolving  
20 conflicts in medical testimony, and resolving ambiguities." Edlund  
21 v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001). The sole  
22 reference to hand tremors in the record of this case comes from the  
23 observations of a psychologist, Dr. McConochie. Medical doctors  
24 clarified that Spingola's shakiness was transient, explaining, "He  
25 does get quite shaky if he does not drink, but he rarely goes a day  
26 without drinking." Tr. 255. One of the rare days Spingola did not  
27 drink was, in McConochie's estimation, the morning he appeared for  
28 his neuropsychological evaluation. McConochie commented, "He did

1 not appear inebriated. He had no alcohol on his breath." Tr. 290.  
2 The ALJ acknowledged all the relevant evidence in the record on the  
3 topic of hand tremors, and relied on the assessment done by Dr.  
4 Komanapalli during Spingola's full physical exam. Dr. Komanapalli  
5 did an extensive analysis of Spingola's ability to use his hands,  
6 concluding that he had "no manipulative limitations." Tr. 303.  
7 Although a nurse practitioner who saw Spingola March 19, 2008, less  
8 than a month before his death, noticed that he was "tremulous when  
9 raising his arms, or changing his position on the exam table," Tr.  
10 344, her statement does not refer to Spingola's hands. Rather, it  
11 appears that she was referring to his whole body. In any event,  
12 Spingola's condition on March 19, 2008, is not dispositive because  
13 he must have been disabled by June 30, 2007, his date last insured.

14 In addition, nothing in the record indicates that Spingola  
15 himself ever complained of any difficulty using his hands. On the  
16 contrary, his view was that "his only current work related problem  
17 [was] back pain." Tr. 291. Moreover, Spingola was able to drive,  
18 do laundry, shop, and clean-all activities requiring use of his  
19 hands. The ALJ took into account the above evidence, and concluded  
20 that there was "no objective basis for imposing any restriction on  
21 the use of Mr. Spingola's hands." Tr. 21. I agree. I find the  
22 medical evidence clearly establishes that hand tremors were not a  
23 severe impairment, and more particularly, not a restriction on his  
24 ability to work.

25 B. Dementia

26 Kusak argues that the ALJ erred by not including dementia as  
27 a severe impairment at step two, as well. During his  
28 neuropsychological assessment, Dr. McConochie diagnosed Spingola

1 with "[d]ementia due to chronic alcohol abuse, by medical record."  
2 Tr. 295. Despite his diagnosis, Dr. McConochie opined that  
3 Spingola's "thought content was logical," Tr. 291, and that he  
4 "had good attention and concentration." Tr. 292. Dr. McConochie  
5 indicated that, with regard to Spingola's ability to engage in work  
6 related activity, he had no impairment in the areas of sustained  
7 concentration and attention, persistence, or in his ability to  
8 engage in appropriate social interaction. Dr. McConochie opined  
9 that Spingola only had a mild to moderate impairment in his ability  
10 to understand and remember instructions. Tr. 295.

11 The ALJ considered Dr. McConochie's opinion together with the  
12 evidence of record, which showed that Spingola drove himself to the  
13 store several times per week, cleaned the surfaces in his house on  
14 a weekly basis, shopped for groceries, cooked simple meals, played  
15 with his daughter's dog, did light chores, and occasionally went  
16 fishing. Tr. 15-16. The ALJ noted that Spingola had no social  
17 difficulties, and that he regularly interacted with his daughter,  
18 his son-in-law, and a neighbor. The ALJ noted that Spingola and  
19 his daughter reported that he had difficulty remembering  
20 instructions, but noted that the record indicated Spingola "lived  
21 basically independently." Tr. 19. The ALJ also considered the  
22 opinion of a non-examining psychiatric consultant, Dr. Frank  
23 Lahman. Dr. Lahman agreed that Spingola had dementia due to  
24 chronic alcohol abuse, but found only a moderate limitation in his  
25 ability to understand, remember, and carry out detailed  
26 instructions. Tr. 328. It was Dr. Lahman's opinion that Spingola  
27 "can remember simple routine instructions," and "can consistently  
28 perform simple repetitive routine tasks." Tr. 330. The ALJ gave

1 great weight to Dr. Lahman's opinion because it "seem[ed]  
2 consistent with Mr. Spingola's self-reported level of functioning  
3 as revealed in the medical records." Tr. 20. Due to the tension  
4 between Spingola's self-reported level of functioning and Dr.  
5 McConochie's testimony, the ALJ gave only partial credit to Dr.  
6 McConochie's opinion.

7 For all of the above reasons, the ALJ found that Spingola was  
8 capable of one to three step tasks, and dementia was not a severe  
9 impairment. I agree with the ALJ's finding because the evidence in  
10 the record, discussed above, establishes that Spingola's dementia  
11 did not significantly limit his mental ability to do basic work  
12 activities. Put otherwise, Spingola's dementia had such a minimal  
13 effect on him that it would not be expected to interfere with his  
14 ability to work.

15 Although the ALJ did not find dementia to be a severe  
16 impairment, she included a limitation of one to three step tasks in  
17 Spingola's residual functional capacity. Even if the ALJ had erred  
18 in her assessment, "any alleged error at step two was harmless  
19 because step two was decided in [the claimant]'s favor with regard  
20 to other ailments" and the ALJ considered the symptoms at issue,  
21 dementia in this case, in formulating the RFC. Mondragon v.  
22 Astrue, 364 Fed. Appx. 346, 1 (9th Cir. 2010).

## 23 II. Examining Physician Testimony

24 The weight given to the opinion of a physician depends on  
25 whether the physician is a treating physician, an examining  
26 physician, or a nonexamining physician. More weight is given to  
27 the opinion of a treating physician because the person has a  
28 greater opportunity to know and observe the patient as an

1 individual. Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007). If  
2 a treating or examining physician's opinion is not contradicted by  
3 another physician, the ALJ may only reject it for clear and  
4 convincing reasons. Id. (treating physician); Widmark v. Barnhart,  
5 454 F.3d 1063, 1067 (9th Cir. 2006) (examining physician). Even if  
6 it is contradicted by another physician, the ALJ may not reject the  
7 opinion without providing specific and legitimate reasons supported  
8 by substantial evidence in the record. Orn, 495 F.3d at 632;  
9 Widmark, 454 F.3d at 1066. The opinion of a nonexamining  
10 physician, by itself, is insufficient to constitute substantial  
11 evidence to reject the opinion of a treating or examining  
12 physician. Widmark, 454 F.3d at 1066 n.2. Opinions of a  
13 nonexamining, testifying medical advisor may serve as substantial  
14 evidence when they are supported by and are consistent with other  
15 evidence in the record. Morgan v. Commissioner of Social Security  
16 Administration, 169 F.3d 595, 600 (9th Cir. 1999).

17 A. Hand Tremors

18 As noted in the previous section, the examining psychologist,  
19 Dr. McConochie, was the sole person who opined that Spingola had an  
20 issue with hand tremors. Dr. Komanapalli, an examining physician  
21 who performed an extensive analysis of Spingola's hands, however,  
22 concluded that Spingola had no manipulative limitations. Dr.  
23 Komanapalli's opinion was consistent with Spingola's own  
24 description of his limitations, and his daily activities as  
25 described above.

26 I find that the ALJ gave specific and legitimate reasons to  
27 reject the opinion of Dr. McConochie with respect to hand tremors.  
28 The ALJ did not err in this regard.

1       B.    Dementia

2       Although both the examining psychologist, Dr. McConochie, and  
3 the nonexamining psychiatric consultant, Dr. Lahman, concluded that  
4 Spingola had dementia as a result of alcohol abuse, the two  
5 differed somewhat their opinions about what Spingola could do. Dr.  
6 McConochie opined that Spingola had a mild to moderate impairment  
7 in his ability to understand and remember instructions. Dr. Lahman  
8 opined that Spingola could remember simple routine instructions and  
9 consistently perform simple repetitive routine tasks. The ALJ  
10 found that Dr. Lahman's opinion was more consistent with the  
11 evidence of daily activities present in the record, and thus gave  
12 great weight to his opinion and only partial weight to Dr.  
13 McConochie's opinion.

14       I find that Dr. Lahman's opinion, taken together with  
15 consistent evidence in the record, gave the ALJ substantial  
16 evidence to assign only partial weight to Dr. McConochie's opinion  
17 regarding dementia. The ALJ, therefore, did not err in this  
18 regard.

19       C.    Sit/Stand Limitation

20       Dr. Komanapalli opined that "[t]he number of hours the  
21 claimant could be expected to stand and walk in an eight-hour work  
22 day is between two and four hours." Tr. 303. Dr. Berner disagreed  
23 with Dr. Komanapalli's opinion based on Dr. Komanapalli's own  
24 medical records. Dr. Berner opined that Spingola could stand or  
25 walk "about 6 hours in an 8-hour workday." Tr. 307. Dr. Berner  
26 explained that he only partially accepted Dr. Komanapalli's opinion  
27 because a "2-4 hour stand walk is excessive restriction based on  
28 [claimant's] own report of being on his feet 1/4 of each day." Tr.

1 312. It is ambiguous whether Spingola (and thus Dr. Berner) meant  
2 one quarter of a 24-hour day or one quarter of his waking hours.  
3 Assuming Spingola referred to his waking hours, simple math<sup>1</sup>  
4 dictates that the ALJ's 4 hour stand/walk limitation is very close  
5 to Spingola's own reports about his ability to stand and walk.

6 More importantly, as the defendant points out, the limitations  
7 imposed by Spingola's alleged back pain are not significantly  
8 backed up by the record. In the record before the court, Spingola  
9 seldom sought treatment for his back pain. Many of the records are  
10 completely absent of any mention of back pain. See e.g. Tr. 249  
11 (discharge diagnoses after a two-week stay in the hospital include  
12 no mention of back problems). By his own admission, the only thing  
13 he did for his back pain was "drink alcohol." Tr. 345. Failure to  
14 seek medical treatment for back pain is "powerful evidence" that  
15 the claimant does not have significant pain. Burch v. Barnhart,  
16 400 F.3d 676, 681 (9th Cir. 2005).

17 Nevertheless, the ALJ put in the residual functional capacity  
18 a limitation that Spingola "should not have stood/walked for more  
19 than four out of eight hours." Tr. 16-17. This limitation is  
20 reasonable in light of the relative absence of medical records  
21 indicating Spingola's alleged back problems or limitations on  
22 \_\_\_\_\_

23 <sup>1</sup> Spingola reported to Dr. Komanapalli that "[h]e sleeps  
24 from 10-12 at night to 6:30 or 7 in the morning." Tr. 300. If  
25 Spingola woke at 6:30 a.m. and went to bed between 10 p.m. and  
26 midnight, then his day was 15.5 to 17.5 hours long, and one  
27 quarter of his day would be 3.875-4.375 hours. If he woke up at  
28 7 a.m. and went to bed at 10 p.m., then his day was 15 hours  
long, and one quarter of his day would be 3.75 hours. Thus,  
depending on how early and late Spingola rose and slept on a  
given day, according to his testimony, he spent between 3.75 and  
4.375 hours on his feet.



1 standing and walking such problems might have caused. The ALJ  
2 explained that Dr. Berner did not agree with Dr. Komanapalli's  
3 assessment because it conflicted with Spingola's statement about  
4 being on his feet for a quarter of the day. The ALJ concluded that  
5 she "assign[s] great weight to Dr. Berner's opinion, as it is well-  
6 explained and thorough" and "assign[s] only partial weight to Dr.  
7 Komanapalli's opinion." Tr. 20. The ALJ further explained that  
8 "the treating source records do not mention back pain or associated  
9 limitations in the record." Tr. 20.

10 I find that the opinion of Dr. Berner, taken together with the  
11 evidence in the record regarding how much time Spingola spent on  
12 his feet and the absence of medical records about back pain and  
13 associated limitations, constitutes substantial evidence sufficient  
14 to accord only partial weight to the opinion of Dr. Komanapalli.  
15 The ALJ did not err in assessing a four hour stand/walk limitation  
16 in Spingola's RFC.

17 According to Kusak, the ALJ's alleged error concerning the  
18 amount of time Spingola could stand or walk means that he should  
19 have been limited to sedentary work and thus deemed disabled under  
20 the medical-vocational rules. A claimant is limited to sedentary  
21 work when he or she can stand or walk no more than two hours in an  
22 eight hour work day. See SSR 83-10. This argument is without  
23 merit. Nowhere in the record, including in the opinion of Dr.  
24 Komanapalli, does anyone indicate that Spingola was only able to  
25 stand and walk for two hours per day. Komanapalli's opinion was  
26 that Spingola should be limited to standing and walking for two to  
27 four hours per day, not just two hours. Moreover, as discussed  
28 above, the ALJ did not err in giving Dr. Komanapalli's opinion only

1 partial weight, by limiting Spingola to four hours or less on his  
2 feet. Thus, the argument that Spingola should have been limited to  
3 sedentary work fails.

#### 4 III. Lay Witness Testimony

5 Lay testimony about a claimant's symptoms is competent  
6 evidence which the ALJ must take into account unless she gives  
7 reasons for the rejection that are germane to each witness. Stout  
8 v. Comm'r Soc. Sec. Admin., 454 F.3d 1050, 1053 (9th Cir. 2006).

9 A medical diagnosis, however, is beyond the competence of lay  
10 witnesses. Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996).

11 A legitimate reason to discount lay testimony is that it conflicts  
12 with medical evidence. Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir.  
13 2001).

14 "[W]here the ALJ's error lies in a failure to properly discuss  
15 competent lay testimony favorable to the claimant, a reviewing  
16 court cannot consider the error harmless unless it can confidently  
17 conclude that no reasonable ALJ, when fully crediting the  
18 testimony, could have reached a different disability  
19 determination." Stout v. Commissioner, Social Sec. Admin., 454  
20 F.3d 1050, 1056 (9th Cir. 2006).

21 Kusak alleges the ALJ erred by rejecting her testimony with  
22 regard to the extent of Spingola's back pain, his ability to stand  
23 and walk, and his mental functioning. For example, Kusak testified  
24 that Spingola "was in incredible amounts of pain always," Tr. 98,  
25 that "the smallest amount of activity would hurt his back," Tr.  
26 101, that he struggled to walk up his own front porch, and that "he  
27 had a hard time walking to the mailbox and back." Tr. 102. Kusak  
28 further testified that after Spingola's hospitalization in January

1 2007 for alcohol withdrawal, that "he just wasn't the same. He  
2 couldn't think straight. A lot of times he wouldn't make sense."  
3 Tr. 101. Relating to Spingola's alcohol abuse, Kusak told doctors  
4 on January 7, 2007 that Spingola "drinks approximately 10 to 12  
5 glasses of rum from the time he wakes up until he goes to bed.  
6 This has gone on for the last 8 years." Tr. 252. Yet she told the  
7 ALJ at the August 19, 2009 hearing that Spingola "would have  
8 probably four or five drinks a day." Tr. 99.

9 The ALJ found that Kusak's testimony about her father's  
10 limitations was "descriptive of her perceptions; however, it does  
11 not provide sufficient support to alter the residual functional  
12 capacity. The behavior observed by Ms. Kusak is not fully  
13 consistent with the medical and other evidence of record." Tr. 19.  
14 The ALJ pointed out that Dr. Miriam Gage noted in December 2007  
15 that after going home from the January 2007 hospital stay, Spingola  
16 "has been relatively intact mentally." Tr. 345. In addition,  
17 despite Kusak's report that Spingola had a hard time walking to his  
18 mailbox and back, Spingola reported on April 17, 2007, a little  
19 over 2 months before his last date insured, he could shop for his  
20 own groceries, Tr. 212, and on June 14, 2007, 16 days before his  
21 last date insured, that he could climb a flight of stairs. Tr.  
22 300.

23 The ALJ fully discussed Kusak's testimony, and found  
24 discrepancies with the medical and other evidence of record. These  
25 discrepancies and inconsistencies with the evidence mentioned in  
26 this and prior sections constitute germane reasons to discount  
27 Kusak's testimony and to conclude that Kusak is not entirely  
28 credible. Accordingly, the ALJ did not err in giving only partial

1 consideration to Kusak's testimony.

2 IV. Ability to Perform Other Work

3 Kusak's final assignment of error alleges if the ALJ had (1)  
4 properly credited the testimony of Dr. McConochie, (2) properly  
5 credited Kusak's testimony, or (3) properly informed the vocational  
6 expert of all of Spingola's impairments, then the VE would have  
7 been unable to find that Spingola was capable of doing work other  
8 than his previous jobs in the national economy. I have rejected,  
9 above, Kusak's contentions regarding her own testimony and Dr.  
10 McConochie's testimony, and will not repeat my reasoning here.  
11 Kusak's assignment of error concerning the limitations imparted to  
12 the vocational expert warrants a brief discussion.

13 According to Kusak, the ALJ failed to include in the  
14 hypothetical presented to the vocational expert that Spingola had  
15 moderate limitations in concentration, persistence or pace, had a  
16 limited attention span, and tended to forget spoken instructions.  
17 The ALJ however, noted in her report all of those alleged  
18 limitations as they appeared in the record. In addition, even Dr.  
19 McConochie only characterized Spingola's impairment as somewhere  
20 between "mild" and "moderate." See Tr. 295. Based on the ALJ's  
21 consideration of the alleged limitations, she formulated a residual  
22 functional capacity that included a limitation "to one to three  
23 step tasks equivalent to specific vocational preparation (SVP) 2  
24 entry level work as defined in the Dictionary of Occupational  
25 Titles." Tr. 17. Similarly, in her hypothetical to the vocational  
26 expert, the ALJ asked the expert to assume an individual who "is  
27 limited to steps no more complex than one, two, three steps or the  
28 equivalent of SVP 2, entry level employment in the Dictionary of

1 Occupational Titles." Tr. 113.

2 Hypothetical questions posed to a vocational expert must  
3 specify all of the limitations and restrictions of the claimant.  
4 Edlund v. Massanari, 253 F.3d 1152, 1160 (9th Cir. 2001). A  
5 hypothetical that includes a residual functional capacity which  
6 incorporates the limitations and restrictions of the claimant,  
7 however, is sufficient. See id. Here, the ALJ incorporated all  
8 of Spingola's mental limitations and restrictions into the residual  
9 functional capacity's three step limitation, and this limitation  
10 was posed in the hypothetical to the vocational expert. Therefore,  
11 the ALJ did not err in this regard.

12 **CONCLUSION**

13 Accordingly, based on the record, the decision of the  
14 Commissioner is affirmed.

15 IT IS SO ORDERED.

16 Dated this 17 day of March, 2011.

17  
18 /s/ Dennis J. Hubel

19 \_\_\_\_\_  
20 Dennis James Hubel  
21 United States Magistrate Judge  
22  
23  
24  
25  
26  
27  
28